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Supreme Court of the United States

OCTOBER TERM, 1959.

No. 869

HERMAN SCHWABE, INC.,
PETITIONER,

v.

UNITED SHOE MACHINERY CORP.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED SHOE MACHINERY CORP.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Herman Schwabe, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on January 20, 1960.

Citations to Opinions Below

The opinion of the District Court (R.A. 10a-12a) [1] is

[1] There is filed in connection with this petition a Record Appendix containing the selected portions of the record of the District Court which were considered on appeal by the Court of Appeals. It is bound with Petitioner's brief. This record appendix is referred to hereafter as R.A. It includes the opinion and judgment of the District Court.

reported in 23 F.R.D. 251. The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, pp. 20-24, is reported in 274 F.2d 608.

Jurisdiction

The judgment of the Court of Appeals was entered on January 20, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

On July 7, 1955 the Congress enacted a law which, for the first time by federal statute, provided a limitations period (four years) for cases brought under the federal antitrust laws. It was made effective on January 7, 1956. (69 Stat. 283; Title 15, U.S.C. §§ 15, 16). This 1955 Act also amended Section 5 of the Clayton Act (Act of October 15, 1914, c. 323, §5, 38 Stat. 731; Title 15, U.S.C. §16) which had provided that whenever an antitrust action is instituted by the United States, the running of the limitation period shall be suspended for a related private right of action during the pendency of the Government action. In amending Section 5 of the Clayton Act, the 1955 Act retained the suspension provision but provided that a cause of action would be barred unless brought within the suspension period or within four years after it accrued. Petitioner filed an antitrust action after the 1955 Act became effective but within four years of the termination of a Government action which was related to Petitioner's action. The questions presented are:

1. Whether the 1955 Act should be applied retroactively so as to eliminate, for a private antitrust action filed after the Act became effective, the suspension of limitation-

arising out of the pendency of a related Government action which was terminated before the Act become effective.

2. Whether the 1955 Act was so ambiguous as to require the resort to Congressional reports to interpret its meaning.

3. Whether the Congressional reports concerning the 1955 Act indicated that it was the intent of the Congress that the provisions respecting suspension of limitations during the pendency of Government antitrust actions be applied to such of those actions as were previously terminated.

4. Whether, if Congressional reports indicated that it was the intent of the Congress to apply the suspensory provisions of the 1955 Act retroactively, those reports countervail the language used in the 1955 Act if that language would otherwise be interpreted to be prospective in effect.

5. Whether the expiration of the six-months grace period between the enactment and effective date of the 1955 Act permitted its retroactive application so as to eliminate, for subsequent private suits, rights of suspension of limitations arising out of previously instituted and terminated Government actions if the pertinent language of the Act referred only to Government actions to be instituted in the future.

6. Whether, if applied retroactively, the 1955 Act should be so construed as to eliminate the suspension of limitations, which arose out of the pendency of a Government antitrust action, with respect to a related private action which was filed after the Act became effective but within four years of the termination of the Government suit.

Statutes Involved

The statutory provisions involved are: Sections 1(b), 2(a), 2(b) and 4 of the Act of Congress of July 7, 1955 [69 Stat. 282; 15 U.S.C. §§15(b), 16(a) and 16(b)] which, for convenience, are referred to hereafter as Sections 1(b), 2(a), 2(b) and 4 of the 1955 Act; Sections 4 and 5 of the Clayton Act as they stood before amendment by the 1955 Act (Act of October 15, 1914 c. 323, §§4, 5, 38 Stat. 731; 15 U.S.C. §§15, 16) which, for convenience, are referred to hereafter as Sections 4 and 5 of the Clayton Act; Section 2 of the Sherman Act (Act of July 2, 1890, c. 647, §2, 26 Stat. 209, 15 U.S.C. §2); the Act of Congress of October 10, 1942 (56 Stat. 781); and the Act of Congress of June 30, 1945 (59 Stat. 306). They are printed in Appendix B, *infra*, p. 25-28.

Statement

On May 27, 1957, Petitioner filed a complaint against Respondent in the United States District Court for the Eastern District of New York under §§4 and 5 of the Clayton Act to recover treble damages by reason of alleged violations of §2 of the Sherman Act. (R.A. 2a, 3a).

The complaint alleged, so far as material here, that Petitioner had been injured in its shoe machinery business from 1939 to the time of the complaint due to the Respondent's monopolization of interstate commerce in shoe machinery by means specified. In its complaint, Petitioner also gave notice that, pursuant to §5 of the Clayton Act, it intended to make all permissible use of a decree entered against Respondent in *United States v. United Shoe Machinery Corp.*, a case brought in the United States District Court for the District of Massachusetts. (R.A. 2a, 3a).

The decree, findings and conclusions of law in *United*

States v. *United Shoe Machinery Corp.* (hereinafter called the Government case) are reported in 110 F. Supp. 295.

The Government case was a civil action filed on December 15, 1947. The Government complaint charged that Respondent had monopolized the shoe machinery industry by various methods, including those alleged in Petitioner's complaint. After trial and on February 18, 1953, the Massachusetts District Court filed its findings and conclusions and entered its final decree. As explained by the findings and conclusions, the final decree adjudged that Respondent had monopolized the shoe machinery industry substantially by the same methods alleged in Petitioner's complaint.

On appeal, this Court affirmed the decree of the Massachusetts District Court. *United Shoe Machinery Corp.* v. *United States*, 347 U.S. 521. The mandate of this Court was received by the Clerk of the Massachusetts District Court on June 23, 1954. (R.A. 3a).

Thus, the Government case was pending from December 15, 1947 to June 23, 1954, the latter date being slightly less than three years before Petitioner filed its complaint.

After joinder of issue and on motion of Respondent, the District Court in the instant case entered a partial summary judgment dismissing any cause of action accruing to Petitioner prior to May 27, 1953, a date exactly four years before the filing of the complaint. As appears from its judgment and opinion, the action of the District Court was based upon its interpretation of the 1955 Act. The District Court also certified that the issue decided by its summary judgment involved a controlling question of law as to which there was a substantial ground for difference of opinion and the resolution of which on appeal might materially advance the litigation. (R.A. 6a, 10a-12a, 14a).

The Court of Appeals granted Petitioner leave to appeal and affirmed the judgment of the District Court. In its opinion the Court of Appeals recognized that decisions

of this Court, *Hassett* v. *Welch*, 303 U.S. 303, 314 and *Claridge* v. *Commissioner of Internal Revenue*, 323 U.S. 141, 164, declared that a retroactive interpretation is not to be imputed to a statute unless such a purpose is clearly intended. Nevertheless, the Court of Appeals held that the suspensory provisions of the 1955 Act should be retroactively applied because Congress gave claimants six months of grace within which to sue. The Court of Appeals further stated that its interpretation of the purpose of the delayed effectiveness of the Act was supported by House and Senate Reports which it did not designate but which, presumably, were those cited in the brief of Respondent. As to the use of the future tense in the Act, the Court of Appeals declared that it was of no moment because of the overall meaning of the statute.

The Court of Appeals also rejected Petitioner's argument that a proper construction of the 1955 Act would afford it suspension of limitations during the pendency of the Government case. The reason given by the Court of Appeals for holding that the 1955 Act provided no suspension to Petitioner was that the proviso to Section 2(b) of the 1955 Act (of Title 15) alternatively granted suspension for private antitrust suits filed: "*either* within the period of suspension *or* within four years after the cause of action accrued". The Court of Appeals must have misunderstood the contention of Petitioner because it is precisely the use of the alternative in the proviso which supplies the basis for Petitioner's claim that it was entitled to suspension during the pendency of the Government suit.

Reasons for Granting the Writ

1. In entering and affirming the partial summary judgment which confined Petitioner's possible recovery to causes of action accruing in the four calendar years immediately

preceding suit, the District Court and the Court of Appeals construed and applied retroactively §§1(b) and 2(b) of the 1955 Act. [Title 15, U.S.C. §§15(b), 16(b)]. Petitioner accepts the retroactive application of §1(b) but questions that given to §2(b).

Section 1(b) provides that "*any* action" to enforce "*any*" federal antitrust cause of action "shall be forever barred unless commenced within four years after the cause of action accrued". (Emphasis supplied). Inasmuch as by its Section 4, the 1955 Act was not made effective until January 7, 1956, litigants were given a six-months grace period within which to take advantage of longer state statutes of limitations. If the Congress had intended §1(b) to affect only those causes of action accruing after its passage, it would either have extended the grace period to four years or it would have substituted the phrase "after the cause of action accrues" for the phrase "after the cause of action accrued". Moreover, the retroactive purpose behind §1(b) is also indicated by the fact that it applies without limitation to "any" action under the federal antitrust laws. Further, unlike §2(b) with which we are chiefly concerned, §1(b) was preceded by no federal statute which would cast doubt upon the need or appropriateness of its retroactive application. Consequently, Petitioner recognizes that it had ample warning that it would lose the benefit of the New York six-year statute of limitations if it failed to file its action before the 1955 Act became effective.

Petitioner was given no similar warning by the provisions of §2(b) that, failure to file suit before the effective date of the 1955 Act, would cause it to lose its rights of suspension of limitations during the pendency of the Government case. On the contrary Petitioner and those in a like status were entitled to assume from the language which Congress used in §2(b): (1) that the section would

not be applied retroactively to eliminate the suspension of limitations arising out of a previously terminated Government suit under the provisions of 2(b)'s predecessor, §5 of the Clayton Act; and (2) that, even if the section were applied retroactively, it would not eliminate suspension where a related Government suit was pending in the four-year period immediately before the filing of the private suit.

Section 2(b) consists of a main body and a proviso. It is the main body which indicates that 2(b) is to be prospective in operation. The main body provides that "whenever" any antitrust action "is instituted" by the United States the running of the statute of limitations in respect of a private right of action based in whole or in part on any matter covered in the Government action "shall be suspended" during the pendency of the Government action and for one year thereafter.

On account of the language used, §2(b) refers, not to a terminated Government action, but only to a future Government action. Both separately and in combination, the phrases "is instituted" and "shall be suspended" point to the future. Neither by language nor implication does §2(b) refer to a terminated Government action such as we have in the instant case. Otherwise, the section would have expressly mentioned a Government action which "was instituted" or "has been instituted" and would have stated that the running of the statute of limitations "shall be deemed to have been suspended" during the pendency of a terminated Government case.

If Congress had intended §2(b) to have an antecedent effect, it would have done as it did in the preceding section of the 1955 Act, §2(a). Section 2(b) of the 1955 Act amended the second paragraph of Section 5 of the Clayton Act; §2(a) amended the first paragraph.

The first paragraph of Section 5 of the Clayton Act had

provided that a decree "rendered" in a Government antitrust suit could be used in a private suit under stipulated conditions. In amending that paragraph §2(a) provided that a decree "heretofore or hereafter rendered" could be so used. "Heretofore . . . rendered" can refer only to a past event. Thus, Congress clearly expressed its intent that §2(a) be applied retroactively.

We submit that if Congress had intended the contiguous and following section of the same act, §2(b), to be similarly effective, Congress would have used equally definite and certain language.

Moreover, in its opinion the Court of Appeals conceded that §2(b) was cast in the future tense. It sought to avoid the consequences of this by resort to extraneous considerations which are discussed in the points below.

However, if, as will be shown, there are no valid extraneous considerations which require the forward thrust of §2(b) to be reversed, then the proviso to 2(b) is not determinative of the question as to whether Petitioner should retain rights of suspension of limitations during the pendency of the Government case. That must be determined by Section 5 of the Clayton Act which was in effect throughout the pendency of the Government case.

Section 5 of the Clayton Act was interpreted by the federal courts to mean that the pendency period of the Government case should be eliminated in calculating the reach of the statute of limitations. Thus, for example, if the state statute of limitations provided that an antitrust action would be barred unless brought within six years after it accrued and if a Government antitrust suit were pending for three years but were terminated less than six years before the filing of a related private antitrust suit, then, under the accepted construction of Section 5 of the Clayton Act, the private litigant could recover for any cause of action accruing within the nine-year period before

suit. Concrete examples of such an application of Section 5 of the Clayton Act are found in *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.* (C.A. 8, 1952), 194 F.2d 846, cert. den. 343 U.S. 942; *Grengs* v. *Twentieth Century-Fox Film Corp.* (C.A. 7, 1950) 232 F.2d 325, cert. den. 352 U.S. 871; *Leonia Amusement Corp.* v. *Loew's Inc.* (S.D. N.Y., 1953) 117 F. Supp. 747.

Therefore, Section 5 of the Clayton Act and Section 1(b) of the 1955 Act should be applied to the facts of the instant case. Accordingly, Petitioner should be able to apply retrogressively from the filing of its suit on May 27, 1957 the four-year limitation period. That would exhaust 2 years, 11 months and 4 days of the limitations period in reaching the June 23, 1954 termination date of the Government case. Then, after applying the 1 year and 26 day balance of the limitations period back of the December 15, 1947 beginning date of the Government case, Petitioner would be entitled to recover for any cause of action accruing on and after November 18, 1946.

Hence, the partial summary judgment entered in the instant case reduced Petitioner's proper recovery period by more than 7 years. It is essential that the correctness of the ruling of the Court of Appeals be reviewed by this Court in order that the need for two lengthy trials may be avoided for this and similar cases. Review is especially important because the opinion of the Court of Appeals seems to conflict squarely with the standards for retroactive application of statutes announced by this Court in cases such as *Hassett* v. *Welch*, 303 U.S. 303, 314 and *Claridge* v. *Commissioner of Internal Revenue*, 323 U.S. 141, 164.

2. In its opinion, the Court of Appeals sought to circumvent the use of the future tense in §2(b) in reference to the institution of the Government actions which were

dealt with in that section, by finding a retroactive purpose from House and Senate reports on the 1955 Act. Even if those reports disclosed such a purpose, there is nothing about the language of §2(b) which requires or even permits resort to legislative reports to interpret its meaning. Section 2(b) refers to future Government actions in simple and understandable language. The Court of Appeals was not able to point to any ambiguity in the framing of the section. It is a recognized canon of statutory construction that only in cases of ambiguity may recourse be had to matters outside of a statute to explain its meaning. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 356; *Wilbur* v. *U. S. ex rel. Vindicator Consol. Gold Mining Corp.*, 284 U.S. 231; *Fairport, P. & E. R. Co.* v. *Meredith*, 292 U.S. 589, 594.

As a consequence, the opinion of the Court of Appeals conflicts with decisions of this Court on the propriety of looking to legislative history to interpret a statute.

3. In its opinion, the Court of Appeals did not designate which of the Congressional reports it considered to show that §2(b) was enacted with a retroactive intent. The brief which Respondent submitted to the Court of Appeals contained a number of quotations from House Report No. 422, April 18, 1955 (84th Cong. 1st Sess.) and from Senate Report No. 619, June 21, 1955 (84th Cong. 1st Sess.).[2] It would be fruitless to discuss all of these quotations but some pertinent observations may be made about them.

In the first and most important respect, not a single statement in the House and Senate reports referred to the applicability of §2(b) to a situation where, as in the instant case, the related Government case was terminated before the 1955 Act was passed.

[2] These excerpts are printed in Appendix C, *infra* pp. 29-32.

Two portions of House Report No. 422 quoted by Respondent expressly state that the reason for the six months grace period was to give litigants located in states where the statute of limitations was longer than the four-year period provided in the 1955 bill, the opportunity to take advantage of the fact.[3] A similar statement was quoted from Senate Report No. 619.[4] Obviously, if the object of the six months grace period was also to give litigants a final opportunity to take advantage of suspension arising out of a terminated Government action, the Senate and House reports would have said so. *Inclusio unius est exclusio alterius.*

Along the same lines, Senate Report No. 619, in the section entitled "Purpose" states that the objectives of the 1955 Act were (a) to grant the United States the right to bring an antitrust damage suit and (b) to establish a uniform four-year statute of limitations.[5] The statement of purpose in a legislative Committee report on a bill is a recognized aid in its construction. See *United States* v. *Shirey*, 359 U.S. 255, 258-261. To change the method of deleting the pendency period of a Government case in computing the reach of the statute of limitations, as was the accepted practice under Section 5 of the Clayton Act, would have been a drastic step for Congress to take. If the Senate framers of the 1955 Act had intended such an important change, it is improbable that they would not have said so in the "Purpose" section of Senate Report No. 619.

The Respondent has pointed to some declarations in the House and Senate reports that the committees believed that the tolling provisions of the Act should not prolong stale claims. These declarations, however, were silent about the retroactive application of §2(b). Moreover, that the Senate

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[3] Appendix C, p. 31, 32.
[4] Appendix C, p. 29.
[5] Appendix C, p. 29.

Committee would not consider Petitioner's present contentions to be advocacy of allowance of a stale claim is indicated by the example cited by the Committee immediately preceding its statement about stale claims.[6]

In fine, there are no statements in the Congressional reports which would reasonably support the conclusion of the Court of Appeals that Congress intended §2(b) to be applied to Government suits previously terminated.

4. Even if there were clear and direct statements in the House and Senate reports that §2(b) referred to past and terminated Government actions, they would be entitled to no weight in the construction of the section. In §2(b) Congress employed words of futurity as the Court of Appeals has conceded. Hence, if a Congressional report stated that the words used had a retroactive operation, it would be an erroneous statement. This would call into play another accepted rule of statutory construction that erroneous statements about a law by the legislature cannot alter it. *Knickerbocker Co.* v. *Stewart*, 253 U.S. 149, 162; *United States* v. *Shreveport Grain and Elevator Co.*, 287 U.S. 77, 83.

A fortiori where, as here, the Congressional reports would have to be sifted and twisted to discern any trace of an intent that §2(b) be retroactively applied, they cannot be permitted to change the plain meaning of the statute. *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 260.

5. In addition to the House and Senate reports, the Court of Appeals relied on the fact that the effective date of the 1955 Act was postponed to six months after its enactment as a reason for applying §2(b) retroactively to determine suspensory rights attaching to a concluded Government case. This ruling allows an unrelated circumstance to alter the meaning of a statute.

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[6] Appendix C, p. 30.

Litigants were entitled to rely on the fact that §2(b) in unmistakable terms provided that it applied only to actions instituted by the United States in the future. Certainly words of futurity are not susceptible of an opposite interpretation because of the mere passage of time. If Section 2(b) referred to a future Government action when it was passed on July 7, 1955, it did likewise when it became effective on January 7, 1956.

The use made of legislative history by the Court of Appeals in this case illustrates the wisdom of the cardinal rule of statutory construction that resort to it should be reserved for the most extreme and doubtful cases. It would be difficult to conceive of a practice more likely to cause uncertainty and chaos than to require consultation of the Congressional Record to determine whether verb tenses used in an Act of Congress were used in their normal sense. It is submitted that the opinion of the Court of Appeals does just that.

6. Even if it were found that §2(b) should be applied retroactively, it should not have been construed, as the Court of Appeals construed it, so as to eliminate Petitioner's right to the suspension of limitations during the pendency of the Government case.

As mentioned under Point 1, *supra*, Section 5 of the Clayton Act provided that whenever an antitrust action is instituted by the United States the running of the statute of limitations in respect of a related private action shall be suspended during the pendency of the Government action. As construed by the federal courts, Section 5 would have afforded suspension to Petitioner during the pendency of the Government case against Respondent.

The suspension provisions of Section 5 of the Clayton Act were retained and their effective period extended to one year after the termination of the related Government

suit by the main body of §2(b) of the 1955 Act. Thus, unless a proviso attached to §2(b) somehow derogates from the main body of the section, Petitioner may retain the suspension of limitations during the pendency of the Government suit and for one year thereafter.

The proviso to §2(b), as any statutory proviso, must be strictly construed so that it carves the least possible exception from the main body of the section. *Shilkret* v. *Municraft Records* (C.A. 2, 1942), 131 F.2d 929, 931.

The proviso in question starts with an assumption, an assumption derived directly from the main body of §2(b). That is this:

> whenever the running of the statute of limitations . . . is suspended hereunder . . .

Hence, through its connection with the main body of §2(b) by use of the word "hereunder," the proviso assumes that a tolling of the statute on account of the prosecution of a Government antitrust suit is subsisting during the pendency period of the Government suit plus one year thereafter. Again by reference to the main body of §2(b), it must be concluded that the proviso assumes that the suspension is subsisting for the benefit of all those who may have claims based on matters covered in the Government suit. See *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 568.

Following this assumption that suspensory rights are lodged with potential antitrust suitors, the proviso sets out two clauses containing conditions. Those clauses provide, in effect, that even though there is a subsisting suspension, a related private antitrust action will, nevertheless, be barred unless it is filed "either" within the suspension period "or" within four years after the cause of action accrued.

Since the proviso uses the disjunctives "either" and "or", the clause: "whenever . . . the statute . . . is suspended hereunder", necessarily modifies, and is to be read as part of, both the clause providing for suit within the suspension period and the clause providing for suit within four years of accrual. Petitioner did not file this action within the suspension period. Hence, we must deal with the second condition of the proviso.

Thus we must construe this statutory language: "whenever . . . the statute . . . is suspended hereunder, any action . . . shall be forever barred unless commenced . . . within four years after the cause of action accrued."

Under the circumstances, does four years after the cause accrued mean (1) four calendar years or (2) four years computed, as in the past, by deleting the pendency period of the Government case from the calculation?

We submit that the term "four years" as used in the proviso to §2(b) means not four calendar years, but four years calculated by taking into account and deleting the time elapsed during pendency of related Government cases. The language of the 1955 Act demands such a construction. The settled construction of similar statutes in the past leads to the same conclusion.

If suits filed after the end of the suspension period lost all suspensory rights and were limited to a four calendar year recovery period, then Congress need not have added the second condition to the proviso. It need not have added that causes of action would be barred unless filed within four years after accrual because Congress had already so provided in §1(b). Thus, the construction of the Court of Appeals would make meaningless surplusage of the second condition of the 2(b) proviso.

Moreover, if there be no suspension except for suits filed in the suspension period, the opening assumption in the proviso, that is "whenever the running of the statute is

suspended hereunder", is rendered useless for causes filed out of the suspension period but within four years of accrual.

The construction applied by the Court of Appeals would produce this situation. The opening words of the proviso state that there is an existing suspension with the necessary implication that it will be preserved if either of two courses is taken: suit in the suspension period or suit within four years of accrual. Despite this, the Court of Appeals says in effect that reliance upon and performance of the second condition in the proviso destroys the basic right of suspension granted by the main body of §2(b). Such a construction would repeal parts of the section and re-write others. It flies in the face of the rule that a statute should be construed as a harmonious whole. *Power Comm'n* v. *Panhandle Co.*, 337 U. S. 498, 514.

If §2(b) be applied retroactively in strict accordance with its terms Petitioner would gain an extra year of suspension and would be permitted to recover for causes of action accruing on and after February 28, 1942 because connection would be made with a special wartime tolling period provided by Acts of Congress. (Act of October 10, 1942, c. 589, 56 Stat. 781; Act of June 30, 1945, c. 213, 59 Stat. 306).

7. It is believed that the instant case is the first in which this Court has been requested to construe the relatively recent federal statute of limitations for antitrust cases. It is the first to be decided by a Court of Appeals although a number of cases under the 1955 Act have been decided by the District Courts[7] and the Court of Appeals for the First

[7] *April* v. *National Cranberry Assoc.* (D. Mass., 1958) 168 F.Supp. 919; *Goodfriend* v. *Kansas City Star Co.* (W.D. Mo., 1958) 158 F.Supp. 531; *LaRouche* v. *United Shoe Machinery Corp.*, (D. Mass., 1958) 166 F.Supp. 633; *Muskin Shoe Co.* v. *United Shoe Machinery Corp.*, (D. Md. 1958) 167 F.Supp. 106; *Solinski* v. *General Electric Co.* (D.N.J., 1957) 149 F.Supp. 784.

Circuit reversed a well-reasoned District Court decision solely on the authority of the opinion of the Second Circuit Court of Appeals in the instant case.[8]

Review of the instant case by this Court is important because the construction and application of the 1955 statute will affect many cases of substance which have been and will be brought in the federal courts. Although, as yet, there are no conflicting cases in Courts of Appeal, the *April* and *Goodfriend* cases cited in footnote 7 are, in rationale and philosophy, in seeming conflict with the opinion of the Court of Appeals in the instant case.

The *April* and *Goodfriend* cases were, unlike the instant case, filed during the pendency period of related Government cases. However, the important point of decision reached in each of them was that recovery was allowed for causes of action accruing before the beginning of the Government suit and accruing more than four calendar years before the bringing of the private suit. Indeed, in both cases the District Courts did not apply retroactively the four-year period of §1(b) of the 1955 Act to causes accruing before it became effective.

Since, as has been explained above in Point 6, there is nothing in the language of §2(b) which requires the elimination of suspension attaching to the pendency of Government cases for private suits filed after the end of the suspension period, the only basis for the decision of the Court of Appeals would be the implementation of an assumed Congressional policy against the bringing of stale claims. Yet *April* and *Goodfriend* permit recovery for

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[8] *International Shoe Machinery Corp.* v. *United Shoe Machinery Corp.*, (D. Mass. 1958) 167 F.Supp. 93, dealt with the 1955 Act in a discovery matter. The reasoning there applied by the District Court was followed in later denying summary judgment. The refusal to grant summary judgment was reversed in *United Shoe Machinery Corp.* v. *International Shoe Machine Corp.*, (C.A. 1, Feb. 23, 1960) 1960 Trade Cases (current) No. 69, 626.

claims spanning the limitations period plus the Government case pendency period. The recovery period claimed by Petitioner covers no more. The action of the Court of Appeals rather arbitrarily forecloses such a recovery period for one of the two classes of cases mentioned in §2(b), whereas the same recovery period is permitted by *April* and *Goodfriend* for the other class of case. This Court should reconcile that conflict for the guidance of the courts and the parties in antitrust litigation.

Furthermore, the opinion of the Court of Appeals has implications which extend its reach beyond the single statute with which it dealt. In finding a retroactive operation for the 1955 Act, the Court of Appeals relied upon considerations which might be generally applied to the construction of other statutes. For this reason, this Court should determine whether the considerations which prompted the Court of Appeals to apply the 1955 Act retroactively are the proper considerations to support the retroactive application of a statute.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75—October Term, 1959.
(Argued November 12, 1959 Decided January 20, 1960.)
Docket No. 25746

HERMAN SCHWABE, INC.,
Appellant,

v.

UNITED SHOE MACHINERY CORPORATION,
Appellee.

Before:

LUMBARD, *Chief Judge*,
HAND and SWAN, *Circuit Judges*.

On appeal from a "partial summary judgment" of the District Court for the Eastern District of New York, Zavatt, *J.* presiding, dismissing under Rule 56(b) so much of the plaintiff's claim as accrued before May 27, 1953.

JAMES M. MALLOY *for appellant*.
RALPH M. CARSON *for appellee*.

HAND, *Circuit Judge*:

This is an appeal from a "partial summary judgment" of the District Court for the Eastern District of New York, Zavatt, *J.* presiding, dismissing under Rule 56(b) so much of the plaintiff's claim as accrued before May 27, 1953. The complaint, filed May 27, 1957, was to recover treble

damages for a violation of §15 of Title 15, U. S. Code (the Clayton Act). It prayed for damages from 1939, resulting from the defendant's monopoly in the shoe machinery business, to which the defendant alleged as a partial defense that the plaintiff could in no event recover for damages occurring earlier than four years before the action was commenced. Judge Zavatt so held, on the ground that the amendment of the Clayton Act of July 7, 1955—effective January 7, 1956—so provided.

• That the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (38 Stat. 730), as amended, is amended by inserting at the end of section 4 the following new sections:

• • • • •

SEC. 4B. (§15b) Any action to enforce any cause of action under sections 4 or 4A shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

SEC. 2. Section 5 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (38 Stat. 731; 15 U. S. C. 16), is amended to read as follows:

SEC. 5. (a) (§16a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A.

(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter. *Provided, how-*

Before that amendment it is agreed that the law of the state where the claim arose determined the limitation upon actions brought under §15. Section 16 of the Act of 1914 (the Clayton Act), had provided that the pendency of a suit by the United States to enforce §15 should suspend the "running of the statute of limitations in respect of each and every private right of action * * * during the pendency thereof," and §16b of the amendment of 1955 changed this provision by adding after the phrase "during the pendency thereof" the words, "and for one year thereafter." A proviso to §16b declared that where the running of a statute against a private action had been so suspended the private action "shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued." The Act of 1955 was passed on July 7, 1955, but did not go into effect till January 7, 1956.*

A suit by the United States upon the same "cause of action" as that at bar was pending between December 15, 1947 and June 23, 1954; and the plaintiff argues that the period of limitation of the action at bar is the period of pendency of the United States suit plus four years after it had ended. Furthermore, it argues that, since it brought suit on May 27, 1957 it was entitled to go back of the pendency of the United States suit for the diffreence between four years and the period between the end of the suspension,—June 23, 1954—and the filing of the action at bar, May 27, 1957. That difference was two years, eleven months and four days, leaving a period of one year and twenty-six

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ever, That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

* * * * *

SEC. 4. This Act shall take effect six months after its enactment

days. The upshot of this according to the plaintiff is that it is entitled to recover for all damages suffered after November 18, 1946. (It claims an even longer period under the Acts of 1942 and 1945, but in the view we take it is not necessary to pass upon these claims.) The argument is that, since §16 of the Act of 1914 gave it the entire period of suspension during the pendency of the United States suit (until June 23, 1954), plus the four years given by §15b of the Act of 1955, the amendment of 1955 should not be construed retroactively to cut down any part of this aggregate period.

It is true that a retroactive interpretation is not to be imputed to a statute unless such a purpose is clearly intended. *Hassett* v. *Welch*, 303 U. S. 303, 314; *Claridge* v. *Commissioner of Internal Revenue*, 323 U. S. 141, 164; indeed, retroaction in some circumstances may even make an amendment unconstitutional unless some equivalent privilege is accorded. However, Congress did accord a sufficient substitute for shortening the pre-existing period by making the Act of 1955 go into effect six months after its passage. This gave to claimants, whose claims would otherwise have been barred, six months of grace within which to sue, and we can find no possible reason for such a delay unless §16(b) was meant to compensate for the shortening of the suspension period. That this was in fact the purpose of the delay patently appears in both the House and Senate reports, to which it is proper to look in case of doubt. *Wright* v. *Vinton Branch*, 300 U. S. 440, 463, 464.

Solinski v. *General Electric Co.*, 149 Fed. Sup. 784, 787; *La Rouche* v. *United Shoe Machinery Corp.*, 166 Fed. Sup. 633; *Muskin* v. *United Shoe Machinery Co.*, 167 Fed. Sup. 106, 110 have interpreted the statute the same way as we do, and although it is true that Judge McCarthy appears to have thought otherwise in *International Shoe Machinery*

Co. v. *United Shoe Machinery Corp.*, 167 Fed. Sup. 93, his conclusion was apparently tentative. Arguments drawn from the use of the future tense are of no moment when the overall meaning is so plain. In order to reverse the judgment we should be obliged to decide directly in the fact of the proviso to §16(b) of the amendment of 1955.

It is not necessary to do more than allude to the plaintiff's further argument that, even though the amendment is retroactive, it should be read as intended to add four years to the existing period of suspension. This is certainly not true, for the proviso to §16(b) is in the alternative: "*either* within the period of suspension *or* within four years after the cause of action accrued."

Judgment affirmed.

APPENDIX B

Statutory Provisions Involved

Section 1(b) of the 1955 Act [Act of July 7, 1955, 69 Stat. 283; Title 15, U.S.C. §15(b)]:

> Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.

Sections 2(a) and 2(b) of the 1955 Act [Title 15, U.S.C. §§16 (a) and 16(b)]:

> A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.
>
> (b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws

and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided, however, that whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

Section 4 of the 1955 Act [Act of July 7, 1955, 69 Stat. 283]:

This Act shall take effect six months after its enactment.

Section 4 of the Clayton Act (Act of October 15, 1914, c. 323, §4, 38 Stat. 731; Title 15 U.S.C. §15):

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 5 of the Clayton Act (Act of October 15, 1914, c. 323, §5; 38 Stat. 731, Title 15, U.S.C. §16):

A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the Unitedf States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties

thereto: Provided, This section shall not apply to consent judgments or decrees entered before any testimony has been taken.

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.

Section 2 of the Sherman Act (Act of July 2, 1890, c. 647, §2 26 Stat. 209, Title 15, U.S.C. §1):

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty or a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $50,000, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court.

Act of October 10, 1942, c. 589 (56 Stat. 781):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the running of any existing statute of limitations applicable to violations of the antitrust laws of the United States now indictable or subject to civil proceedings under any existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President may designate. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply

to acts, offenses, or transactions which are already barred by the provisions of existing laws.

Act of June 30, 1945, c. 213 (59 Stat. 306):

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That the first section of the Act entitled "An Act to suspend until June 30, 1945, the running of the antitrust laws," approved October 10, 1942 (56 Stat. 781; U.S.C. Supp. III, Title 15, note following §16), is amended by striking out the date "June 30, 1945" where it appears in such section and inserting in lieu thereof the date "June 30, 1946."

APPENDIX C

Excerpts from Senate and House Reports on the 1955 Act

Senate Report No. 619 of June 21, 1955 (84th Cong. 1st Sess.; 2 U. S. Code Congressional and Administrative News, 1955, p. 2328 et seq.)

p. 2328:

Purpose

The purpose of the proposed legislation is to amend the Clayton Act (38 Stat. 730) by (a) granting the United States the right to recover actual damages for injuries to its business or property by reason of violations of the antitrust laws and (b) by establishing a uniform 4-year statute of limitations for antitrust damage suits brought by private parties or the United States.

p. 2329:

Section 4 of the bill provides that the effective date of the proposed legislation shall take effect 6 months after its enactment. This will give plaintiffs, whose actions have accrued more than 4 years prior to enactment of this legislation, but who are not yet barred from suing under local statutes of limitation, half a year's grace within which to commence their suits.

p. 2332, 2333:

This bill makes several important changes in the tolling provisions of existing law. As presently written, section 5 of the Clayton Act tolls the statute of limitations with respect to private treble-damage suits during the pendency of a suit by the United States to punish or restrain violations of the antitrust laws. This period of tolling is continued by the present bill with several modifications.

There are many instances where the statute of limitations as to a private cause of action may nearly

have expired before suit is instituted by the Government under the antitrust laws. Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint. To alleviate such difficulties, the present bill would extend the tolling period not only for the duration of the Government's antitrust suit, but for 1 year thereafter. This would guarantee all plaintiffs an adequate period in which to take advantage of Government antitrust proceedings.

While the committee believes it important to safeguard the rights of plaintiffs by tolling the statute during the pendency of Government antitrust actions, it recognizes that in many instances the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts. The committee believes the provision of this bill will tend to shorten the period over which private treble-damage actions will extend by requiring that the plaintiff bring his suit within 4 years after it accrued or within 1 year after the Government's case has been concluded.

While the committee considers it highly desirable to toll the statute of limitations during a Government antitrust action and to grant plaintiff a reasonable time thereafter in which to bring suit, it does not believe that the undue prolongation of proceedings is conducive to effective and efficient enforcement of the antitrust laws. The present bill would assure all plain-

tiffs of at least 4 years from the time their cause of action accrued in which to institute suit. It would also guarantee every plaintiff at least a year from the close of a Government antitrust suit to prepare his case and file his complaint. But in cases where the plaintiff's action had been suspended by the pendency of a Government antitrust proceedings, he would be required to bring his action either (a) within the suspension period, i.e. within 1 year after the Government suit had terminated, or (b) within 4 years after his cause of action accrued.

House Report No. 422 of April 18, 1955 (84th Cong. 1st. Sess.)

Section 4 of the bill provides that the effective date of the measure shall be 6 months after its enactment. This provision will give a half-year period of grace within which treble damage actions may be brought by persons whose causes of action have accrued for more than 4 years, and who wish to bring suit in those States having applicable statutes of limitations greater than the 4-year period provided for herein. Thus, where the State statute of limitations is longer than the new Federal statute, 6 months is provided from the date of enactment of this measure for those whose rights may be cut off by the new limitation to bring their cases to court.

Regarding actions in those States possessing a statute of limitations longer than the 4-year period herein prescribed, a 6-month period is afforded by section 4 of the bill before the provisions of the new legislation become effective, thus allowing those with valid causes of action presently existent to bring their cases into court. Inasmuch as the majority of such actions would in all probability lie in States with a 6-year limitation period, the 6-month period of grace

should amply safeguard the rights of those whose causes of action have already accrued in these jurisdictions.

Section 2 of the bill amends section 5 of the Clayton Act by providing that the statute of limitations with respect to private antitrust actions shall be tolled for an additional year after the termination of a Government antitrust proceeding in order to permit the parties to take full advantage of the final Government decree as prima facie evidence of their case and to have sufficient time in which to file suit.

It further provides that while the period in which to bring a private treble damage action shall in no case be less than 4 years, nevertheless, in instances where a private suit is tolled because of the pendency of a Government proceeding, private treble damage actions must be instituted within 1 year after the termination of the Government's case if, at the end of such period, 4 years or more shall have elapsed since the cause of action accrued. This requirement is designed to prevent interminable delay and congestion of court calendars, as well as encouraging the prompt adjudication of private treble damage suits.

The present bill would assure all plaintiffs of at least 4 years from the time their cause of action accrued in which to institute suit. It would also guarantee every plaintiff at least a year from the close of a Government antitrust suit to prepare his case and file his complaint. But in cases where the plaintiff's action had been suspended by the pendency of a Government antitrust proceeding, he would be required to bring his action either (a) within the suspension period, i.e. within 1 year after the Government suit had terminated, or (b) within 4 years after his cause of action accrued.

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 869

HERMAN SCHWABE, INC.,
Petitioner,

v.

UNITED SHOE MACHINERY CORPORATION,
Respondent.

RESPONDENT'S BRIEF OPPOSING CERTIORARI

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May 16 1960.

Supreme Court of the United States

OCTOBER TERM, 1959

HERMAN SCHWABE, INC., *Petitioner*, v. UNITED SHOE MACHINERY CORPORATION, *Respondent*.		No.

RESPONDENT'S BRIEF OPPOSING CERTIORARI

The petition states no ground under Rule 19 for allowance of the writ of certiorari in this case. The only two decisions of Federal courts of appeals on the construction of the four-year statute of limitations are in accord, not in conflict. No Federal question was decided below in a way in conflict with applicable decisions of this court. The accepted and usual course of judicial proceedings has not been departed from. While the proper construction of the Federal four-year statute of limitations is an important one, the construction adopted below is so clearly right that it need not be re-settled by this Court.

The Government antitrust case against United Shoe Machinery Corporation[1] was brought in December 1947 and ended with receipt of this Court's mandate June 23 1954. More than a year later, Congress on July 7 1955 amended[2] the Clayton Act to provide a uniform four year period of limitation for private antitrust cases. To allow a grace period in view of longer pre-existing State limitation statutes, Congress provided that the amendment should not take effect until January 7 1956.

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[1] *United States v. United Shoe Machinery Corporation* 110 F. Supp. 295 (D. Mass. 1953), aff'd 347 US 521.

[2] 69 Stat. 282-3; 15 USC §§ 15b, 16(b).

Question Presented

The six "questions" stated at pp. 2-3 of the petition are nothing more than variations of a single argument. The only question that can be derived from this record is:

> Is a private treble damage action which was filed 17 months after the effective date of the new Federal statute of limitations, 15 USC §§ 15-16, and almost three years after the conclusion of the related Government antitrust suit, barred with respect to claims accruing more than four years before its filing?

Argument

There are at least three compelling reasons why the Court of Appeals' opinion, 274 F. 2d 608, does not merit review here:

1. The question is not one which requires to be decided here for the purpose of settling the law in the future. Petitioner's argument on the "retroactivity" score could apply only in cases where the Government action was terminated before January 7 1956 (i.e. effective date of the four-year statute) *and* less than four years before filing of the private treble damage suit. But such a state of facts cannot recur in any case brought after January 7 1960. The same result follows if it be argued (cf. petition p. 8) that the amendment applies only to Government suits brought *after* it took effect. For more than the past four years it has been mathematically impossible for the Government either to commence or to terminate an action except after January 7 1956. Far from the question having any special or important significance, it is one which time itself erases for other cases.

2. The application of the amendment by both courts below is obviously correct. The six-months' grace period would be meaningless unless it were intended that at the end of that delay the statute would apply to Government cases already ended (a consideration Judge Hand treated as determinative, 274 F. 2d at 610). This explanation of the grace period is that which Judge Hand thought "patently appears" (274 F. 2d at 610) from the statements made about the statute in both the House and the Senate (set forth in part only by petitioner). All other cases considering the point are in accord with the result here. *April* v. *National Cranberry Association* 168 F. Supp. 919 (D. Mass. 1958); *Muskin* v. *United Shoe Machinery Corp.* 167 F. Supp. 106 (D. Md. 1958); *LaRouche* v. *United Shoe Machinery Corp.* 166 F. Supp. 633 (D. Mass. 1958); *Goodfriend* v. *Kansas City Star Co.* 158 F. Supp. 531 (WD Mo. 1958); *Solinski* v. *General Electric Co.* 149 F. Supp. 784 (D. NJ 1957); cf. *Fleischer* v. *A. A. P.* 180 F. Supp. 717 (SDNY 1959). One case was decided otherwise by a district court, and was reversed on appeal. *United Shoe Machinery Corp.* v. *International Shoe Machinery Corp.* 275 F. 2d 459 (CA 1 1960).

3. There is not the faintest need for "two lengthy trials . . . for this and similar cases" (petition p. 10) under the decision as affirmed. The extent of the permissible damage period having been defined, the cases will proceed to trial and judgment in the usual manner. Nor does the Court of Appeals' opinion "conflict squarely" (petition p. 10) with generally accepted rules of statutory construction. Judge Hand cited, observed and applied the cases cited by petitioner to the point that although "retroaction" with no form of relief may sometimes be repugnant, no difficulty is presented where ap-

propriate delay is provided for the saving of rights before the statute takes effect.

In considering petitioner's construction it should be remembered that this action was not brought until almost a year and a half after the Federal four-year statute took effect with its related express tolling provision. The old tolling technique petitioner refers to (petition p. 9) was not a part of the laws of the United States when this action was commenced, having been erased from the books by the amendment of July 7 1955 effective January 7 1956. A six-month delay was provided, which petitioner chose to disregard. He now asks that the law move backwards for his benefit to resume a method found unsatisfactory and expressly rejected by Congress long before he sued.

The effect of petitioner's claim is that the Congressional enactment of 1955 operated not to *limit* him to four years but to *enlarge* by first one year and then more (under wartime tolling) the time he would have had to sue until by virtue of the amendment he can recover for events happening over 15 years before he sued (petition p. 17). Of this sinuous argument, it is enough to say that it has been described as "entirely without merit" by a district court in Massachusetts,[3] rejected as "contrary to the plain wording of the statute" by a district court in New York,[4] and dismissed as "certainly not true" by Judge Learned Hand in the decision below.

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[3] *LaRouche* v. *United Shoe Machinery Corp.* 166 F. Supp. 633 (D. Mass. 1958).

[4] *Fleischer* v. *A. A. P., Inc.* 180 F. Supp. 717, 724 (SDNY 1959).

Conclusion

THE WRIT SHOULD BE DENIED.

Respectfully submitted,

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May 16 1960.